

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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MAR 25 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:

Amendment of 73.202(b)
Table of Allotments
FM Broadcast Stations
(Wallace, ID and Bigfork, MT)

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)
Docket No. 98-159

Facility ID No. 83460

To: The Commission

Opposition to Application for Review

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March 25, 2002

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Ltr. to FCC

OPPOSITION TO APPLICATION FOR REVIEW

Anderson Broadcasting Company (“Anderson”), successor in interest to Alpine Broadcasting Limited Partnership (“Alpine”), the previous holder of the construction permit for radio station KSIL(FM), Wallace, Idaho(“KSIL”), and the Petitioner in this proceeding, hereby submits its Opposition to the Application for Review filed by Bee Broadcasting, Inc.(“Bee”), licensee of radio stations KDBR(FM) and KBBZ (FM), Calispell, Montana; KKMT(FM), Columbia Falls, Montana; and KJJR(AM), Whitefish, Montana. Pursuant to the Commission’s authorization (BALH-20010214ADB), Alpine assigned KSIL to Anderson. That transaction was consummated and the Commission was promptly notified.

In its Application for Review, Bee states that there are two factors warranting review of the Commission’s May 11, 2001, *Report and Order* (“*Order*”) allocating a Class C FM channel to Bigfork, Montana, and authorizing the operation of KSIL on that channel in Bigfork rather than Wallace. First, Bee contends that the decision is in conflict with existing case precedent; second, Bee asserts that policy issues need to be decided before the allocation to Bigfork can properly be approved. Yet Bee cites no case in conflict with the decision and identifies no unresolved policy question. Rather, Bee is simply attempting to protect its current operations in Montana from a competitor. This appeal by Bee has nothing to do with the public interest, but Bee has so far managed to

generate more paper than there are people affected by this move. As will be shown, the Commission's *Order* was fully consistent with the Commission's Rules, Regulations and policies and presents no novel policy issues warranting any delay in service to residents of Bigfork, Montana.

In its Application for Review, Bee claims that four issues need to be resolved by the Commission. Those issues will be addressed *seriatim*, although Anderson does not intend to burden the record in this proceeding by repeating all that has gone on before. The *Report and Order* (DA 01-1200) issued May 11, 2001, by the Chief of the Allocations Branch; the *Memorandum Opinion and Order on Reconsideration* (DA 02-29) issued February 8, 2002; and the various pleadings submitted by Alpine all answer the issues raised by Bee on this appeal.

BURDEN OF PROOF

The first argument advanced by Bee is that the decision unlawfully relieved the petitioner of its evidentiary burden of proof. It is noteworthy that, in making the argument, Bee cites to no case, policy, or precedent that requires dismissal of a petition if the Commission's allocations staff performs its own analysis of the facts, whether to correct an applicant submission or to account for changed circumstances.

To support its assertion that the petitioner was unfairly relieved of a burden of proof, Bee suggests that Alpine engaged in some gamesmanship. Inexplicably, Bee perceives "gamesmanship" in Alpine's construction of KSIL facilities in Wallace, Idaho as a Class C2, fully consistent with the Commission's Rules. Bee then makes the following astounding statement, knowing it to be untrue:

The purpose of such gamesmanship was, as admitted by Alpine, to improve its rulemaking case by reducing the amount of ‘white and gray area’ that would be abandoned by its proposed change of KSIL–FM’s community of license from Wallace, Idaho to Big Fork, Montana.

Absurd is one comment that comes to mind. Attached hereto as Exhibit 1 is the Response to Supplemental Notice that was submitted by Alpine to the Commission on July 12, 2000 (*attachment omitted*) and Bee’s response thereto. First, nowhere in that Supplemental Notice does Alpine “admit” to gamesmanship. Rather, what Alpine states, under oath, is that the governmental agency controlling the transmitter site for the radio station in Wallace, Idaho would not allow a high power facility to be built at that site, citing concerns for low power users at the site. In other words, the site manager was concerned that the proposed facilities of Alpine would simply overwhelm the signals of the other users. Accordingly, Alpine was only allowed to build a Class C2 facility. Taking away the gamesmanship argument, Alpine is left with no argument.

The second item of interest in Bee’s argument on this point is that Bee faults the staff explanation of not wanting to further delay the proceeding by asking for information from Alpine that it already had. Yet delay is what Bee wants.

This proceeding was delayed for three years because Bee has done a marvelous job of using the Commission’s processes for its own advantage, and a marvelous job of preventing the public interest from being served by this new station. Bee itself opposed the rulemaking, and then, under rather strange circumstances as outlined in the Response to Supplemental Notice, *supra*, Bee withdrew its objections to the move. Bee next went back before the staff and filed additional pleadings after it had withdrawn. Then, when the Commission issued its *Report and Order* of May 11, 2002, Bee filed a Petition for

Reconsideration of that decision. When the Commission, on reconsideration, addressed all of the points raised by Bee and issued the decision of February 8, 2002, Bee filed the instant Application for Review.

If there ever were an egregious case of a licensed competitor's manipulating the Commission's processes for its own benefit, to delay initiation of service by a new entrant, this is the case. The Commission has not, however, in the past felt constrained to take any steps to prevent these abuses. Anderson now asks the Commission to act promptly on this appeal, and put Bee's delaying tactics to bed.

GRAY AREA

Similarly without foundation is Bee's argument that the Commission staff has somehow erred in determining that one hundred and fifty (150) people, in a predicted gray area, were de minimus in the context of this case. The Commission held in Seabrook, Texas, 10 FCC Rcd 9360 (1005), that 450 people in a gray area were de minimus, a decision cited by the staff. Bee cites to no case in which one hundred and fifty people are decisionally significant, and does not even mention Seabrook in its appeal.

IMPROPER ALLOCATION

Bee argues that the Commission improperly allocated a full Class C channel to Bigfork, Montana. The argument goes something like this. Bee Broadcasting was successful in delaying the proposed rulemaking filed by Alpine. Alpine, because of the delay, was forced to build less than a Class C station because of constraints at its

authorized transmitter site and the potential expiration of its permit. Because Alpine was forced by Bee's delaying tactics to build less than a Class C, the facts then changed, and consequently, Bee is entitled to commence the delaying process yet again.

The argument is as silly as it sounds. The Commission had allocated a Class C channel to Wallace, Idaho; when the petition was filed, there was a Class C channel allocated to Wallace, Idaho; Alpine petitioned to have that Class C channel moved to Bigfork, Montana; the staff properly took into consideration the changes that had occurred in the intervening period, and properly concluded that the proposal to add a Class C station at Bigfork satisfied all of the applicable Rules, Regulations and policies of the Commission.

OPPORTUNITY TO COMMENT

Bee argues that the public has never had an opportunity to comment on the proposal adopted by the Commission. As Bee has tirelessly demonstrated throughout this process, there has been plenty of opportunity to comment. Bee just does not like the result.

When the Petition for Rulemaking was first filed, the public had the right to comment on the Petition. When the *Notice of Proposed Rule Making* was adopted, the public had the right to comment on the *Notice*. That *Notice* set out the proposal to remove the allocation from Wallace, Idaho, and to move it to Bigfork, Montana. Bee objected to the move to Montana because it would increase competition to Bee. No other member of the public either opposed the move from Wallace, nor opposed the move to

Bigfork. When the Commission adopted the *Report and Order* authorizing the change, Bee filed for reconsideration. So, too, could the public have filed, yet no one did.

Any interested person was on notice that Wallace, Idaho was losing an FM allocation. Nobody objected. The public was continuously on notice that Bigfork, Montana was gaining a Class C FM channel. Nobody, except for Bee, objected. The public had all the notice that was required by the applicable laws, Rules, and policies, and, in fact, had ample notice to express its displeasure at many stages in this proceeding. Bee cites to nothing to demonstrate that the Commission staff was in any way in error in this proceeding.

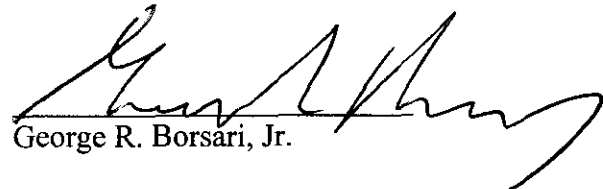
CONCLUSION

Bee's Application for Review should be denied.

Respectfully submitted,

ANDERSON BROADCASTING CO.

By:


George R. Borsari, Jr.

Its Attorney

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March 25, 2002

BEFORE THE
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In the Matter of)	
)	MM Docket No. 98-159
Amendment of Section 73.202 (b),)	RM-9290
Table of Allotments, FM Broadcast Stations)	
(Wallace, Idaho and Bigfork, Montana))	

To: Chief, Allocations Branch, Mass Media Bureau

RESPONSE TO SUPPLEMENTAL NOTICE

Alpine Broadcasting Limited Partnership ("Alpine"), permittee of unbuilt FM Broadcast Station KSIL, Channel 264C, Wallace, Idaho, and petitioner in the above-captioned rule making proceeding to reallocate Channel 264C from Wallace, Idaho, to Bigfork, Montana and modify the KSIL authorization accordingly, hereby responds to a Supplemental Notice of Relevant Precedent filed by Bee Broadcasting, Inc. ("BBI") on June 20, 2000, ostensibly pursuant to Section 4 of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (j). As will be set forth below, Alpine submits that BBI's filing stems from competitive concerns unrelated to the public interest. Moreover, BBI's arguments are premised on the erroneous assumption that the service area of the unbuilt KSIL facilities, as authorized by the Commission's construction permit authorization, and the resulting gain/loss area considerations of the reallocation of Channel 264C are relevant to this proceeding, when, in fact, Alpine cannot and will not operate KSIL as a Class C facility at Wallace, Idaho;

accordingly BBI's arguments are simply not probative and should not be relied upon by the Commission in deciding this proceeding.

1. Background. Alpine was granted a construction permit for KSIL on March 3, 1997; the construction permit, a copy of which is set forth at Attachment A, specifies a transmitter site, managed by the Shoshone County Sheriff's Department, on Goose Peak, 5 km northwest of Burk, Idaho. However, as is set forth in a declaration of Scott D. Parker, Alpine's general partner, filed with the Commission on June 3, 1998, in connection with an extension of the KSIL construction permit (and set forth as Attachment B), low power communication users at the Goose Peak transmission site have objected to Alpine's use of the site, claiming that the high power KSIL facilities would cause interference to their equipment, and, as a result, the site manager, on the advice of the site's consulting engineer, will not allow use of Alpine's high power Class C facilities at this site.

2. Accordingly, on February 24, 1998, Alpine petitioned the Commission to reallocate Channel 264C from Wallace, Idaho to Bigfork, Montana where several suitable existing transmitter sites were available for Class C facilities. On September 24, 1998, the Commission issued a Notice of Proposed Rule Making (NPRM) in the instant proceeding proposing to reallocate Channel 264C from Wallace, Idaho to Bigfork, Montana, as that community's first local service, for use by KSIL.

3. Discussion. Almost two years have passed since issuance of the NPRM and the Commission has yet to render a decision on Alpine's proposed reallocation. In ultimately rendering a decision, however, Alpine believes a relevant factor is that on July 7, 2000 it filed an application, set forth as Attachment C, to modify the KSIL construction permit to downgrade the authorized KSIL facilities to Class A facilities in order to meet the interference concerns of the Goose Peak

transmission site users and in order to preserve the KSIL construction permit, at its authorized transmission site, which is set to expire on December 21, 2000.

4. As a general rule, the Commission believes it is appropriate for FM channel allotment purposes to determine coverage areas, and those portions of coverage areas which are characterized as loss areas, premised on the use of maximum facilities based on the assumption that use of maximum facilities comports with the real expectation that significant economic incentives will operate to spur stations to serve the greatest area possible for their class of stations. Harrisburg and Albermarle, North Carolina, 2 CR 956 (Mass Media Bureau 1996). However, with respect to Class C stations, the Commission has made an exception from its general assumption of maximum facilities in recognition that FAA constraints, local zoning ordinances and cost considerations often prevent the construction of full Class C facilities. See Greenup, Kentucky and Athens, Ohio, 6 FCC Rcd, 1493, 1497 (at fn. 7).

5. Secondly, while the Commission carefully evaluates an FM channel allocation proposal which would result in the loss of an existing reception service, since KSIL is unbuilt and is not operating, the public has not become reliant on KSIL's programming service and, therefore, a reallocation of the KSIL allocation from Wallace, Idaho to Bigfork, Montana, would not raise the same concerns as would the loss of service resulting from removal of an operating station, especially since such reallocation would not result in relocation of KSIL from a rural to an urban area. See Chatom and Grove Hill, Alabama, 12 FCC Rcd 7664 (Mass Media Bureau 1997); Sanibel and San Carlos Park, Florida, 10 FCC Rcd 7215 (1995); Pawley's Island and Atlantic Beach, South Carolina, 8 FCC Rcd 8657 (1993); and Glencoe and LeSueur, Minnesota, 7 FCC Rcd 7651 (1992).

6. Based on the above channel allocation precedents, Alpine submits that any decision premised on the public interest benefits of KSIL's unbuilt facilities operating as a Class C station in Wallace, Idaho with maximum facilities would be specious and that, in this instance, the Commission's FM allotment priorities for first and second full-time aural services within the gain and loss areas are clearly subsidiary to the first local service and other public interest priorities for FM channel allocations.

7. Notwithstanding the foregoing, a summary of the record in this proceeding may be helpful to put in perspective some of the public interest matters before the Commission. In its supporting comments filed on October 26, 1998, Alpine submitted the engineering statement of Donald E. Mussell, Jr. establishing that: (a) retention of Channel 264C in Wallace, Idaho (albeit that Station KSIL is unbuilt and will not operate as a Class C facility) would provide service to 137,068 persons in an area of 26,219 square kilometers and constitute a third local service (in addition to KSIL, Station KWAL (AM) and unbuilt Station KQWK (FM), Channel 248C2, are licensed to Wallace, Idaho); (b) reallocation of Channel 264C to Bigfork, Montana would provide service to 83,067 persons in an area of 25,050 square kilometers and constitute a first local service to Bigfork; (c) the currently authorized (before downgrade) KSIL facilities licensed to Wallace, Idaho, and the proposed KSIL facilities licensed to Bigfork, Montana, would overlap an area of 3,280 square kilometers comprising 3,270 persons for a net gain of 79,797 persons in an area of 21,770 square kilometers and a net loss of 133,798 persons in an area of 22,939 square kilometers; and (d) there are a total of 20 operating radio stations within the 60 dBu service contour of the authorized but unbuilt KSIL facilities at Wallace, Idaho, and 10 operating radio stations within the 60 dbu service contour of the proposed KSIL facilities at Bigfork, Montana.

8. On October 26, 1998 and November 9, 1998, BBI submitted, respectively, comments and reply comments opposing Alpine's proposed reallocation of Channel 264C on the grounds that (a) Bigfork is not an appropriate community for allotment purposes, (b) reallocation would result in a "loss" of potential service to 1,553 persons within a white area of 3,518 square kilometers and 2,705 persons within a gray area of 2,855 square kilometers (BBI Reply Comments, Exhibits E-1 at page 2 and E-5) whereas the gain area would encompass a white area of 40 square kilometers and 0 people and a gray area of 1,085 square kilometers and only 10 persons (BBI Opposition, Exhibit E-1 at page 2) and (c) the Commission's highest FM allocation priority, to provide unserved or underserved areas and populations with new service, dictates that the allotment remain in Wallace. See Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982).

9. BBI also submitted that the public would be better served by a reallocation of Channel 264C to Kellogg, Idaho, but that is not the proposal of Alpine nor is it a viable counterproposal in this proceeding under the provisions of Section 1.420 (i) of the Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.

10. BBI, the licensee of FM Broadcast Stations KDBR and KKBZ, Kalispell, Montana, KKMT, Columbia Falls, Montana and AM Broadcast Station KJJR, Whitefish, Montana (within or near the Bigfork service area proposed by Alpine), is owned by Benny Bee, Sr. While BBI clearly has a proprietary interest in opposing Alpine's proposed channel allocation, on February 26, 1999, however, it withdrew its opposition to Alpine's proposal. In a subsequent declaration of no consideration filed on August 11, 1999 (and set forth as Attachment D), Benny Bee, Sr. stated that the reason for withdrawing its opposition (in which BBI had argued, in part, that Bigfork, Montana

was not incorporated and, therefore, should not be considered as a community for allocation purposes) was that BBI was, in fact, a dues-paying member of the Bigfork Area Chamber of Commerce which was not consistent with its contention that Bigfork was not a recognizable community. Alpine submits that BBI was less than candid with the Commission as to the reason for withdrawing, on February 26, 1999, its opposition to Alpine's Bigfork reallocation proposal.

11. Shortly after BBI filed its October 26, 1998 opposition to Alpine's reallocation proposal, Alpine was approached by Benny Bee, Sr. to sell the KSIL construction permit to BBI. Subsequently, Benny Bee, Sr. informed Alpine that, under the Commission's multiple ownership rules, BBI was precluded from acquiring KSIL and that an entity controlled by his adult children would be purchasing the KSIL construction permit with their own funds and would operate KSIL independent of BBI's stations; nevertheless, it was Benny Bee, Sr., not his children, who negotiated the asset purchase agreement with Alpine. In any event, on February 19, 1999, Alpine entered into an Asset Purchase Agreement (the "Agreement") with Battani Communication, Inc. ("BCI") for sale of the KSIL construction permit, and on February 26, 1999, one week after Alpine entered into the Agreement with BCI, BBI withdrew its opposition to Alpine's reallocation proposal.

12. An application (File No. BAPH-990301GF), a copy of which is set forth as Attachment E, to assign the KSIL construction permit from Alpine to BCI was duly filed with the Commission on March 1, 1999 and granted on April 26, 1999. As set forth in that assignment application, BCI is a Nevada corporation, the principals of which are Cassie Bee (Vice President, Director and 44% equity owner) and Benny Bee, Jr. (President, Director and 51% equity owner); although not disclosed in the application, Cassie Bee and Benny Bee, Jr. are the children of Benny Bee, Sr. Alpine submits that, in essence, BBI, through BCI, took out an "insurance policy" to

insulate itself from competition in the event the Commission approved Alpine's proposed channel reallocation to Bigfork.

13. The KSIL Agreement (see Attachment D) provides at, respectively, Sections 4 and 8 that (a) consummation of the transaction is conditioned upon the Commission granting Alpine's pending petition for rule making in this proceeding, MM Docket No. 98-159, and (b) either party may terminate the Agreement if the transaction has not been consummated before June 16, 2000. BCI has not terminated the Agreement; however, on June 20, 2000, four days after the "drop dead" date for consummation of the Alpine-BCI transaction, BBI, having withdrawn its opposition on February 26, 1999, and, presumably, no longer interested in this proceeding, filed its Supplemental Notice of Relevant Precedent stating that "Counsel for BBI is obligated to bring to the Commission's attention two cases [Wallace, Idaho and Lolo, Montana, MM Docket No. 97-203, DA 99-2653, released November 30, 1999, and Pecos and Wink, Texas, MM Docket No. 97-235, DA 99-313, released February 12, 1999]---each decided after the Parties' comments were filed in this proceeding---that arguably are relevant here."

14. In Wallace, Idaho and Lolo, Montana, the Commission denied a proposal to downgrade the channel allotment of an unbuilt Class C2 station to Class C3 and move the allotment from Wallace to Lolo. The Commission found that the proposed Lolo station would provide a 70 dBu city grade signal not only over all of Lolo, but also over the entirety of the Missoula, Montana Urbanized Area and there was not sufficient independence of Lolo from Missoula to justify a first local service preference for Lolo; as Alpine's Bigfork allotment proposal, however, does not trigger urbanized area coverage and a corresponding need to justify a first local transmission service

preference, the Wallace, Idaho and Lolo, Montana decision has no discernable relevance to this proceeding.

15. In Pecos and Wink, Texas, the Commission denied a requested reallocation of Channel 247C1 from Pecos to Wink, Texas, on the basis that retention of the channel in Pecos for use by an unbuilt station would provide potential service to 673 people in a white area covering 2,182 square kilometers merited a higher allocation preference than providing a first local service to Wink which receives four reception services. As to Alpine's proposed reallocation of Channel 264C from Wallace, Idaho, to Bigfork, Montana, BBI asserts that this would involve a loss of potential service to 1,553 persons within a white area of 3,518 square kilometers and 2,705 persons within a gray area of 2,855 square kilometers and that, based on the FM allotment priorities, retention of the channel in Wallace is superior to the proposed reallocation to Bigfork because the existing arrangement of allotments would provide a first full-time aural reception service at Wallace over a first local service at Bigfork.

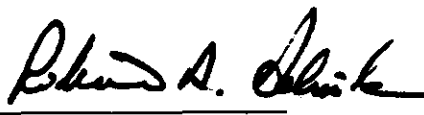
16. However, as Alpine cannot and will not operate 264C from Wallace, but, rather, must downgrade such allocation to 264A in order to operate from its proposed transmission site, there will be no "loss" of potential service to either white or gray areas in the event of a reallocation of Channel 264C to Bigfork. Moreover, a first local service at Bigfork would be preferable and in the public interest, albeit that BBI would face additional competition as a result, since it would promote the Commission's twin goals of viewpoint diversity and economic competition. Accordingly, Alpine contends that the Commission's decision in Pecos and Wink, Texas is inapposite.

17. Whether BBI has been candid with the Commission or whether BBI has attempted to manipulate the Commission's processes in this proceeding to achieve a result for its private gain

are secondary to whether the proposed reallocation of Channel 264C from Wallace, Idaho to Bigfork, Montana, is in the public interest; however, whatever decision is rendered by the Commission in this matter, Alpine submits that it should be based on real world public interest considerations rather than theoretical preferences which have no likelihood of coming to fruition.

Respectfully submitted

ALPINE BROADCASTING LIMITED PARTNERSHIP

By: 

Richard A. Helmick

COHN AND MARKS

1920 N Street, N.W.
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Its Attorneys

July 12, 2000

STATEMENT OF SCOTT D. PARKER

Scott D. Parker, under penalty of perjury, hereby states as follows:

1. I am the sole general partner of Alpine Broadcasting Limited Partnership
2. I have read the foregoing Response to Supplemental Notice and the facts set forth therein are true and correct.

Dated: July 12, 2000

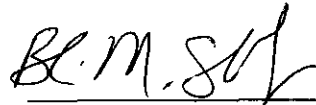


Scott D. Parker

CERTIFICATE OF SERVICE

I, Blair M. Stansfield, do hereby certify that a copy of the foregoing
OPPOSITION TO APPLICATION FOR REVIEW has been sent, via first class United
States mail, postage pre-paid, this 25th day of March, 2002, to:

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Blair M. Stansfield